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13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN FRANCISCO DIVISION**

16 ALICIA HERNANDEZ, *et al.*,  
17 individually and on behalf of all others  
similarly situated,

18 Plaintiffs,

19 v.

20 WELLS FARGO & COMPANY and  
21 WELLS FARGO BANK, N.A.,

22 Defendants.

No. 3:18-cv-07354 WHA

**DEFENDANT WELLS FARGO &  
COMPANY'S REPLY IN FURTHER  
SUPPORT OF ITS MOTION TO DISMISS  
THE FIRST AMENDED CLASS ACTION  
COMPLAINT**

Date: June 20, 2019

Time: 8:00 a.m.

Courtroom: 12

Judge: Hon. William H. Alsup

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1      **I. INTRODUCTION**

2      Plaintiffs' Opposition confirms that the FAC should be dismissed. Plaintiffs concede that  
 3 they are strangers to the Holding Company, having had no contract or relationship with it  
 4 whatsoever. Plaintiffs attempt to avoid the damning nature of that concession by allegations that the  
 5 Holding Company "owned" and "controlled" the Bank. Neither is or could adequately be pled,  
 6 which is likely why the Opposition resorts to misconstruing the relevant law. Indeed, Plaintiffs'  
 7 heavy reliance on rhetoric, and conclusory allegations devoid of facts, reveals one thing: their claims  
 8 against the Holding Company are legally deficient, and the Court should dismiss them with  
 9 prejudice.

10     **II. ARGUMENT**

11     **A. Plaintiffs Have Not Alleged That the Holding Company is Responsible for the  
 12         Alleged Actions of its Subsidiary.**

13     In their Opposition, Plaintiffs claim they have alleged two bases for making the Holding  
 14 Company liable for the alleged actions of its subsidiary, the Bank. Relying on the same conclusory  
 15 allegations of "ownership," "control, and overlapping "officers and/or directors," Plaintiffs argue  
 16 that the Holding Company and the Bank are alter egos, and that the Holding Company is "indirectly  
 17 liable to Plaintiffs through the acts of its agent, [the Bank]." Opp. at 5. Plaintiffs are wrong on both  
 18 fronts.

19     **1. Plaintiffs' Alter Ego Allegations Are Woefully Insufficient.**

20     First, as California courts repeatedly have held, "[a]lter ego is an extreme remedy, sparingly  
 21 used." *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 539 (2000). Accordingly,  
 22 conclusory allegations of alter ego status are inadequate; instead, the "plaintiff must allege  
 23 specifically both of the elements of alter ego liability, as well as facts supporting each." *Sandoval v.*  
 24 *Ali*, 34 F. Supp. 3d 1031, 1040–41 (N.D. Cal. 2014) (citation omitted). Plaintiffs Opposition  
 25 confirms they have not met this heightened standard. Indeed, by repeating the FAC's conclusory  
 26 allegations of "ownership and control" and overlapping officers and directors, the Opposition  
 27 exposes Plaintiffs' belief that scattering a few buzzwords into the FAC is enough to sustain an alter  
 28 ego allegation. *See* Opp. at 5 (the Holding Company "owns and controlled the Bank" and "the

1 Bank's board of directors 'were also officers and/or directors of [the Holding Company]". But state  
 2 and federal courts in California repeatedly hold that such conclusory allegations are not enough.  
 3 *See, e.g., Quigley v. Verizon Wireless*, 2012 WL 1945784, at \*4 (N.D. Cal. May 30, 2012) ("broad  
 4 allegations of control, standing alone, are not sufficient to meet the Rule 8 standard laid out in  
 5 *Twombly* and *Iqbal*"). And, Plaintiffs do not cite a single case allowing such conclusory allegations  
 6 to proceed.

7 In any event, sole ownership and control is itself insufficient to make the Holding Company  
 8 liable for the Bank's alleged actions. *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d  
 9 1143, 1149 (9th Cir. 2004);<sup>1</sup> *see also Leek v. Cooper*, 194 Cal. App. 4th 399, 415 (2011) ("allegation  
 10 that a person owns all of the corporate stock and makes all management decisions is insufficient to  
 11 cause the court to disregard the corporate entity"). The allegedly overlapping "officers and/or  
 12 directors" also is insufficient. As explained in the opening brief, courts agree that "[i]t is entirely  
 13 appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact  
 14 alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *Sonora  
 15 Diamond Corp*, 83 Cal. App. 4th at 549. In fact, the presumption is "that each common officer or  
 16 director wore the appropriate 'hat' when making corporate and operational decisions for the  
 17 respective entities." *Id.* The FAC does not make a single allegation rebutting this presumption.

18 In a tacit admission that their existing allegations are insufficient—and in an apparent  
 19 attempt to improperly amend their allegations through their Opposition brief<sup>2</sup>—Plaintiffs next argue  
 20 that the Holding Company's consolidated SEC reporting "demonstrate[s] [the Holding Company's]  
 21 direct oversight of the Bank's mortgage modification and foreclosure procedures." Opp. at 4.<sup>3</sup> But  
 22 it is well-established that consolidated reporting – *i.e.*, reports that combine information about the  
 23

24 <sup>1</sup> Plaintiffs assert that *Katzir* is not controlling because it was not decided at the motion to dismiss  
 25 stage. However, the opening brief cites *Katzir* for its well-established, non-controversial statements  
 26 of law. Plaintiffs' attempt to distinguish *Katzir* based on its procedural posture, and not on the law,  
 27 demonstrates the weaknesses of their position.

28 <sup>2</sup> It is well-established that a party cannot amend its complaint through an opposition to a motion to  
 29 dismiss. *See, e.g., Lamberth v. Clark City Sch. Dist.*, 698 F. App'x 387, 389 (9th Cir. 2017).

<sup>3</sup> As shown in the Opposition to Plaintiffs' Request for Judicial Notice, filed contemporaneously  
 30 herewith, the contents of the Holding Company's SEC filings are not judicially noticeable, and  
 31 cannot save Plaintiffs' claims in any event.

1 subsidiary with information about the parent – is a common business practice that is recommended  
 2 by generally accepted accounting principles and allowed by both the IRS and the SEC. *See Sonora*  
 3 *Diamond Corp.*, 83 Cal. App. 4th at 550. Accordingly, courts have found that the use of “we, “the  
 4 Company,” or even a single name to refer to both the parent and subsidiary in such reports cannot be  
 5 the basis of establishing that the companies are, in practice, a single entity. *Id.*

6 Plaintiffs’ final argument is that they have adequately alleged the second prong of alter ego  
 7 liability: that an inequitable result will follow if the Court considers the actions taken by the Bank to  
 8 be those of the Bank alone. According to Plaintiffs, “the complaint illustrates the injustice or fraud  
 9 that would result if [the Holding Company and the Bank] are not treated as alter egos,” because it  
 10 alleges that the Holding Company’s “risk management executives and directors failed to monitor  
 11 HAMP programs ‘in violation of the promises they made in the 2011 Consent Order,’” and,  
 12 “allowing [the Holding Company] to avoid accountability to Plaintiffs for failing to do so would be  
 13 unjust.” Opp. at 6 (citing FAC ¶ 46). That argument misses the mark for multiple reasons. First,  
 14 Plaintiffs have conflated their indirect theory of liability against the Holding Company—*i.e.*, that it  
 15 should be responsible for the Bank’s alleged conduct—with whether the Holding Company is  
 16 directly liable to them as a result of its own conduct (“allowing [the Holding Company] to avoid  
 17 accountability to Plaintiffs for failing to [comply with the 2011 Consent Order] would be unjust”).  
 18 Second, the Holding Company owed Plaintiffs no duties under HAMP or the 2011 Consent Order,  
 19 so Plaintiffs cannot rely on either to sustain a claim against the Holding Company. And finally, to  
 20 adequately allege the second alter ego prong, Plaintiffs must allege facts showing, for example, that  
 21 the Bank “would be unable to satisfy a judgment that Plaintiff[s] might obtain.” *Saaiman v. Am.*  
 22 *Gen. Life Ins. Co.*, 2019 WL 1864858, at \*5 (S.D. Cal. Apr. 25, 2019). Whether or not Plaintiffs  
 23 believe it would be “unjust” to allow the Holding Company “to avoid accountability” for the conduct  
 24 alleged has nothing to do with that analysis.

25 **2. Plaintiffs Have Not Alleged a Basis to Find an Agency Relationship  
 26 Between the Holding Company and the Bank.**

27 Nor have Plaintiffs adequately alleged an agency relationship between the Holding Company  
 28 and the Bank. The “key characteristic” required to find an agent-principal relationship is control.

1     *Sonora Diamond Corp.*, 83 Cal. App. 4th at 541. Plaintiffs' burden here is not a light one. Rather,  
 2     they must allege "that the [Holding Company] so controls [the Bank] as to cause [the Bank] to  
 3     become merely the instrumentality of [the Holding Company]." *Pantoja v. Countrywide Home*  
 4     *Loans, Inc.*, 640 F. Supp. 2d 1177, 1192 (N.D. Cal. 2009). For this reason, "general executive  
 5     control over the subsidiary is not enough; rather there must be a strong showing beyond simply facts  
 6     evidencing the broad oversight typically indicated by the common ownership and common  
 7     directorship present in a normal parent-subsidiary relationship." *Id.* at 542 (internal quotation marks  
 8     and citation omitted). A parent-subsidiary relationship is not a principal-agent relationship unless  
 9     the parent "moved beyond the establishment of general policy and direction for the subsidiary and in  
 10    effect [has] taken over performance of the subsidiary's day-to-day operations in carrying out that  
 11    policy." *Id.* (emphasis in original).

12       In their Opposition, Plaintiffs ignore these pleading requirements. Instead, just as they do  
 13    with their alter ego arguments, Plaintiffs simply repeat the FAC's conclusory allegations of  
 14    "ownership and control." *See Opp.* at 5. But Plaintiffs do not allege any facts showing that the  
 15    Holding Company took over the Bank's day-to-day mortgage modification and foreclosure  
 16    operations. Indeed, they allege the opposite: that the Holding Company did not exercise enough  
 17    control over the Bank. *See, e.g.*, FAC ¶¶ 2, 5, 7, 43-47. Far from establishing agency, Plaintiffs have  
 18    pled themselves out of that liability theory, and the Court should dismiss it as a matter of law.

19       For all these reasons, Plaintiffs have not alleged a basis to render the Holding Company  
 20    liable for the purported acts of its subsidiary, and the claims against it should be dismissed with  
 21    prejudice.

22       **B. The Holding Company is Not Directly Liable to Plaintiffs.**

23       Given the utter lack of connection between Plaintiffs and the Holding Company, Plaintiffs  
 24    necessarily strain to defend including the Holding Company as directly liable. Each claim premised  
 25    on direct liability should be dismissed.

26       **1. Plaintiffs Intentional Infliction of Emotional Distress Claim Should Be**  
 27       **Dismissed (Count II).**

28       The Opposition ignores the Holding Company's argument that as a non-lender/servicer who

1 did not deny any putative class members a mortgage modification, foreclose on any of their  
 2 properties, or have any relationship with them whatsoever, the Holding Company could not have  
 3 directed any of its alleged conduct at them or acted in their presence—a required element for their  
 4 IIED claim. *See Christensen v. Super. Ct.*, 54 Cal. 3d 868, 903 (1991) (in alleging a claim for  
 5 intentional infliction of emotional distress, “[i]t is not enough that the conduct be intentional and  
 6 outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of  
 7 whom the defendant is aware.”) (emphasis added); *see also Whitlock v. Pepsi Ams.*, 681 F. Supp. 2d  
 8 1116, 1122 (N.D. Cal. 2010). Instead, Plaintiffs argue that “[t]here is a direct connection between  
 9 [the Holding Company] and the emotional distress that Plaintiffs suffered.” Opp. at 6. That is not  
 10 the law—aptly demonstrated by Plaintiffs’ failure to cite any.

11 Next, Plaintiffs argue that their IIED claim does not attempt to enforce the Holding  
 12 Company’s government consent orders or HAMP because “nowhere in the complaint do Plaintiffs  
 13 include any claims or allegations to enforce those government regulations.” Opp. at 7. But  
 14 Plaintiffs give themselves away elsewhere in the Opposition, where they admit: “Plaintiffs’ First  
 15 Amended Complaint includes claims based, in part, on … government consent orders … .” Opp. at  
 16 1. Plaintiffs also ignore their own pleading, which specifically premises their claims on alleged  
 17 HAMP and consent order violations.<sup>4</sup> While the Holding Company acknowledges that the Court has  
 18 allowed Plaintiffs’ HAMP- and the consent-order based claims to proceed against the Bank, critical  
 19 differences require a different outcome regarding the Holding Company. It is undisputed that, unlike  
 20 the Bank, the Holding Company had no relationship with Plaintiffs at all. Thus, without any  
 21 relationship or other basis to assert their claims against the Holding Company, Plaintiffs necessarily

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22 <sup>4</sup> See FAC ¶ 34 (alleging that Plaintiffs could have avoided their claimed injuries “if Wells Fargo  
 23 had lowered their mortgage payments as HAMP required”); ¶ 39 (“the Bank repeatedly violated  
 24 HAMP”); ¶ 192 (“Wells Fargo ignored consent decrees requiring it to reform its mortgage  
 25 modification and foreclosure practices”); ¶ 201 (“Wells Fargo’s conduct violated HAMP”); ¶ 217  
 26 (asserting violations of HBOR: “Wells Fargo was therefore required to offer Plaintiffs and class  
 27 members the opportunity to cure their default by accepting a [HAMP] mortgage modification before  
 28 it could exercise its right to foreclose[.]”); ¶ 224 (asserting violation of UCL: “Wells Fargo engaged  
 in unlawful practices by denying mortgage modifications to Plaintiffs and class members in violation  
 of HAMP and other governmental requirements.”); and ¶¶ 233, 238 (asserting claims under various  
 state consumer protection statutes: “Wells Fargo engaged in unfair practices by denying mortgage  
 modifications to Plaintiffs and class members in violation of HAMP[.]”).

1 must rely on breaches of HAMP and the consent order—there is nothing else. Plaintiffs admit they  
 2 cannot enforce the consent order, and, HAMP does not help them either; it is undisputed that the  
 3 Holding Company did not participate in HAMP, thus, any alleged HAMP violations cannot form the  
 4 basis of a claim against the Holding Company. For this reason, Plaintiffs' cited cases, *Corvello v.*  
 5 *Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013), and *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851  
 6 F.3d 851 (9th Cir. 2017), which involved **mortgage servicers** who refused to give the plaintiffs  
 7 permanent loan modifications upon successful completion of their HAMP trial payment plans, are  
 8 irrelevant.

9 Because Plaintiffs had no relationship or dealings with the Holding Company, their IIED  
 10 claim should be dismissed.

11 **2. Plaintiffs' California Negligence Claims Should Be Dismissed (Count III).**

12 The first sentence of Plaintiffs' negligence argument demonstrates exactly why their  
 13 negligence claim fails as a matter of law. As Plaintiffs concede, a party is liable for negligence only  
 14 when "he owes a duty of care to a plaintiff or a class of which a plaintiff is a member," and "[t]his  
 15 duty may arise through statute or contract, or it may be based on the parties' relationship." Opp. at  
 16 7. But, as Plaintiffs admit, they had no contract and no relationship with the Holding Company.<sup>5</sup>  
 17 Accordingly, the Holding Company's alleged duties to them must arise out of a statute.

18 But it is axiomatic that the Holding Company's government consent orders were not  
 19 statutes. Nor was HAMP – which, again, the Holding Company did not participate in. Rather,  
 20 HAMP was a voluntary government program and certainly not a statute. *See, e.g., Ridenhour v.*  
 21 *Bank of Am., N.A.*, 23 F. Supp. 3d 1201, 1206 (D. Id. 2014) ("The HAMP guidelines are not  
 22 regulations. Thus, they do not create legal duties, and the claim, as pled, should be dismissed.").  
 23 *See also* Section 4, below.

24 In an attempt to avoid this result, Plaintiffs again try to disclaim the consent orders, arguing  
 25 that they "do not refer to the 2011 Consent Order to predicate their negligence claim, but as evidence

26 <sup>5</sup> Plaintiffs admit they are not "in privity" with the Holding Company, and cite *Aas v. Super. Ct.*, 24  
 27 Cal. 4th 627, 645 (2000), as support for allowing their negligence claim to proceed. *See* Opp. at 8.  
 28 *Aas* discussed the economic loss rule, which holds that plaintiffs cannot recover in tort for purely  
 economic losses. *Aas* is not relevant to any issue before the Court.

1 of [the Holding Company's] knowledge of its previous and continued misconduct . . ." Opp. at 8,  
 2 n.3. As shown in the opening brief, however, duties do not "arise out of thin air." *Pullen v. Victory*  
 3 *Woodwork, Inc.*, 2007 WL 1847633, at \*3 (E.D. Cal. June 27, 2007). Plaintiffs never identify any  
 4 other source of the Holding Company's alleged "obligations to properly maintain and test its  
 5 software programs" or its "oversight, auditing, and testing responsibilities in the foreclosure and loss  
 6 mitigation (loan modification) arenas" (Opp. at 8), and, as courts repeatedly have held, alleged  
 7 breaches of the duties in the 2011 Consent Order cannot form the basis of a negligence claim. *See*  
 8 *Velasco v. Wells Fargo Bank*, 2015 WL 12746226, at \*3 (C.D. Cal. Jan. 8, 2015) ("[Plaintiff's]  
 9 attempt to rely on the Consent Order to create a duty of care . . . is . . . without merit because [she] is  
 10 not a party to the Consent Order, and the Consent Order specifically denies a private right of action  
 11 to third parties."); *Henrietta E. Willis Revocable Trust v. Wells Fargo Bank, N.A.*, 2014 WL  
 12 12596430, at \*5 (C.D. Cal. Nov. 10, 2014) (rejecting negligence claim premised upon Wells Fargo's  
 13 2011 OCC Consent Orders, reasoning that it expressly precludes third-party claims and could not  
 14 support the imposition of any duties of care on Wells Fargo).<sup>6</sup> Plaintiffs have no answer for these  
 15 cases—which presumably is why they have ignored them.

16 Plaintiffs next argue that the six "Biankanja" factors<sup>7</sup> compels the Court to create new law  
 17 and conclude that the Holding Company owed them—complete strangers—a duty of care. *See* Opp.  
 18 at 7-8. Plaintiffs' pithy, six-sentence analysis of those factors is not supported by a single citation to  
 19 their FAC or by a single case. And, in light of the Court's June 3, 2019 order ("Order"), which  
 20 dismissed the negligence claim against the Bank—the only defendant with whom Plaintiffs had a  
 21 relationship—this claim necessarily must fail as to the Holding Company, which was a complete  
 22 stranger to them. Dkt. 87 at 12-14. This claim, too, should be dismissed.

23  
 24 <sup>6</sup> *See also Conant v. Wells Fargo Bank, N.A.*, 60 F. Supp. 3d 99, 117 (D.D.C. 2014); *Lucke v. Wells*  
 25 *Fargo Bank, N.A.*, 2014 WL 12601035, at \*3 (D. Minn. Apr. 2, 2014); *Ghaffari v. Wells Fargo*  
*Bank, N.A.*, 2014 WL 6606611, at \*8 (M.D. Pa. Nov. 19, 2014); *Peters v. Wells Fargo Bank, N.A.*,  
 2013 WL 12218470, at \*5 (C.D. Cal. Dec. 19, 2013).

26 <sup>7</sup> (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability  
 27 of harm to him," (3) "the degree of certainty that the plaintiff suffered injury," (4) "the closeness of  
 28 the connection between the defendant's conduct and the injury suffered," (5) "the moral blame  
 attached to the defendant's conduct," and (5) "the policy of preventing future harm." *Biankanja v.*  
*Irving*, 49 Cal. 2d 647, 650 (1958).

### **3. Plaintiffs' Wrongful Foreclosure and HBOR Claims Fail (Counts IV and V).**

Plaintiffs concede that their wrongful foreclosure and HBOR claims against the Holding Company are based solely on their “indirect” theories of liability, *i.e.*, agency and alter ego. *See* Opp. at 8-10. As shown above and in the opening brief, those theories fail as a matter of law. Thus, Plaintiffs’ wrongful foreclosure and HBOR claims against the Holding Company should be dismissed with prejudice.

#### 4. The Court Should Dismiss Plaintiffs' UCL Claim (Count VI).

Plaintiffs' Opposition does not salvage their UCL claim.

First, an “unlawful” UCL claim must be based on a violation of another law. *See Opp.* at 10 (“the UCL does not ‘enforce’ other laws; it ‘borrows’ violations of other laws and treats them as unlawful practices”). According to Plaintiffs, they base their unlawful UCL claim on “a ‘predicate’ violation of HAMP and its implementing directives, which have the force of law.” *Opp.* at 11. Plaintiffs are wrong. HAMP was not law, but rather a voluntary government *program*, and its guidelines were neither law nor regulation. *See, e.g., Ridenhour*, 23 F. Supp. 3d at 1206 (“The HAMP guidelines are not regulations. Thus, they do not create legal duties ... “). The HAMP guidelines were neither the subject of formal notice and comment rulemaking nor were they published in the Federal Register – both of which the Administrative Procedures Act requires for legislative rules imposing new duties (which do have the force and effect of law). *See* 5 U.S.C. § 553; *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003) (“Legislative rules that impose new duties upon the regulated party have the force and effect of law and must be promulgated in accordance with the proper procedures under the Administrative Procedures Act”; *Coon v. Fed. Nat'l Mortg. Ass'n*, 2018 WL 3887508, at \*7 n. 12 (E.D. Va. Aug. 15, 2018) (HAMP directive “does not constitute a rule with the effect of law” because it “was not subject to the notice or comment requirements and simply provides guidance to servicers on the obligations under HAMP”). As HAMP lacks the force or effect of law<sup>8</sup>

<sup>8</sup> Wells Fargo recognizes that the Court has determined that whether HAMP includes a private right of action is not determinative of Plaintiffs' UCL claim. Dkt. 87 at 8-9.

1 it cannot underpin Plaintiffs' UCL claim under the "unlawful" prong.

2 Plaintiffs' lone case on this score, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir.  
 3 2012), does not help them. *Wigod* did not suggest – as the Opposition states – that "[Plaintiffs] may  
 4 plead a UCL unlawful claim based on a 'predicate' violation of HAMP and its implementing  
 5 directives, which have the force of law." First, *Wigod* did not even involve a UCL claim, let alone  
 6 address the statute's requirements.<sup>9</sup> Second, the Opposition cites to *Wigod* as "explaining  
 7 implementation of HAMP 12 U.S.C. § 5219(a) through Secretary of Treasury directives" – as if this  
 8 explanation somehow supports Plaintiff's position. On the contrary, the fact that Treasury directives  
 9 implement the program only proves the Motion's point. Directives do not have the force of law, as  
 10 courts have "repeatedly and resoundingly held." *Reamer v. Deutsche Bank Nat'l Tr. Co. Americas*,  
 11 2016 WL 1259557, at \*5 (E.D. Va. Mar. 28, 2016) ("[C]ourts have 'repeatedly and resoundingly held'  
 12 that Supplemental Directive No. 09-01 [HAMP] does not have such force of law that a violation would  
 13 provide a cause of action under a contract's applicable law provision, because no private right of action  
 14 by a borrower to enforce HAMP regulations exists."); *Weathers v. HSBC Bank USA, NA*, 2015 WL  
 15 506459, at \*4 (Minn. Ct. App. Feb. 9, 2015) ("There is no caselaw, nor do appellants cite any, that  
 16 states that HAMP directives are 'state or federal law'"); *Menacho v. U.S. Bank Nat'l Ass'n*, 281 F.  
 17 Supp. 3d 607, 609–10 (E.D. Va. 2017) ("Supplemental Directive 09–01 was not subject to the notice  
 18 or comment requirements, and simply provides guidance to servicers on the obligations under HAMP  
 19 ... [and] is therefore only an 'interpretive rule' applicable as guidance from the agency, and not with  
 20 the effect of law.") (internal citation omitted); *CitiMortgage, Inc. v. Carpenter*, 2012 WL 1079807, at  
 21 \*6-7 (Ohio Ct. App. March 30, 2012) ("Although the language in the Treasury's Supplemental  
 22 Directives requires certain procedures to be followed, '[t]he HAMP program itself is not codified as a  
 23 public law.' ... [And] [a]lthough the terms found within the Treasury's Supplemental Directive 09–08  
 24 ... appear to be mandatory, neither HAMP itself nor the Treasury's guidelines has the force and effect

25  
 26 <sup>9</sup> Indeed, while this Court's Order found *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir.  
 27 2012) persuasive with respect to Plaintiffs' contention that the absence of a private right of action  
 28 from a federal statute does not automatically foreclose a claim under state law, it was not discussed  
 for the proposition cited in the Opposition – either in the Order or the underlying briefing for the  
 Bank's motion to dismiss. See Dkt. 87 at 7-9.

1 of law.”); *PNC Mortg. v. Garland*, 2014 WL 1325908, at \*11 (Ohio Ct. App. Mar. 20, 2014) (“Unlike  
 2 the HUD requirements, which are contained in the Code of Federal Regulations and have the force of  
 3 law, HAMP requirements are found in directives put forth by the U.S. Treasury and do not have the  
 4 full force and effect of law.”).

5 Nothing in *Wigod* suggests the court intended to part with this well-established law. On the  
 6 contrary, to the extent the court gave force to the directives, it was only in accordance with the TPP  
 7 agreement, as it found that the “HAMP guidelines unquestionably formed the reasonable expectations  
 8 of the parties to Wigod’s TPP Agreement[.]” *Id.* at 565; *see also id.* at 568 (“to the extent Wells Fargo  
 9 had a duty to service Wigod’s home loan responsibly and with competent personnel, that duty emerged  
 10 solely out of its contractual obligation). In short, HAMP does not have the force of law and it cannot  
 11 be the basis for an “unlawful” prong claim.

12 With respect to the “unfair” prong, Plaintiffs first argue that the conduct alleged in the FAC  
 13 was “unfair” because it “undermine[s] the policies underlying HAMP and HBOR, both of which seek  
 14 to avoid unnecessary foreclosures and promote fair mortgage servicing practices.” Opp. at 12. First,  
 15 Plaintiffs’ reference to HBOR is a non-starter; they admit that they have not adequately alleged an  
 16 actual violation of HBOR against the Holding Company and that they instead seek to impose “indirect”  
 17 liability on the Holding Company for this claim. Opp. at 9. In order to state claim under unfair prong’s  
 18 public policy test, “a plaintiff must identify an actual policy based on a legal provision *that the*  
 19 *defendant violated.*” *Hodges v. Apple Inc.*, No. 13-CV-01128-WHO, 2013 WL 4393545, at \*6 (N.D.  
 20 Cal. Aug. 12, 2013) (dismissing unfair prong claim) (emphasis added). Here, Plaintiffs concede the  
 21 Holding Company is not even subject to HBOR, which applies to mortgage servicers and not holding  
 22 companies. Cal. Civ. Code §2924.17. Thus, HBOR cannot be the required “tethering” for Plaintiffs’  
 23 unfair prong claim.

24 Next, Plaintiffs baldly assert, without support, that “[i]f Wells Fargo refuses to devote  
 25 resources to testing its mortgage modification systems and ensuring compliance with legal  
 26 requirements, it will gain an unfair competitive advantage over those firms who play fairly and devote  
 27 a significant part of their capital and workforce to auditing and compliance.” Opp. at 12. Plaintiffs  
 28 do not explain how *the Bank’s* foreclosing delinquent mortgages instead of modifying them unfairly

1 inures to the benefit of the Holding Company, or how the Holding Company's own internal processes  
 2 negatively affect competition. Nor do Plaintiffs have standing to bring an "unfair" UCL claim based  
 3 on this (unpled) allegedly anti-competitive conduct. *See Almasi v. Equilon Enters., LLC*, 2012 WL  
 4 3945528, at \*10 (N.D. Cal. Sept. 10, 2012).

5 Finally, Plaintiffs' UCL claim also fails because it is premised on the same defective theories  
 6 as their other claims. Because each claim fails for the various reasons explained herein, Plaintiff's  
 7 UCL claim must also fail. *See Cabanilla v. Wachovia Mortg.*, 2012 WL 13020028, at \*4 (C.D. Cal.  
 8 Mar. 20, 2012) (claim for unlawful, unfair, and fraudulent business practices in violation of  
 9 California's UCL failed where it was premised on the same conduct that formed the basis of deficient  
 10 claims for negligent implementation of the HAMP, breach of contract, among others); *Rubin v. Wal-*  
 11 *Mart Stores, Inc.*, 599 F. Supp. 2d 1176, 1179 (N.D. Cal. 2009) (where a UCL claim is predicated on  
 12 other claims that fail, the UCL claim must be dismissed as well) (same); *Toneman*, 2013 WL  
 13 12132049, at \*20-22 (C.D. Cal. Oct. 21, 2013) (same).

14 Thus, Plaintiffs' UCL claim should be dismissed.

15 **5. The Court Should Dismiss Plaintiffs' Various State Consumer Protection  
 16 Claims (Count VII).**

17 As to their other state consumer protection claims, Plaintiffs simply refer the Court to pages  
 18 3-4 and 7-8 of their Opposition. Significantly, Plaintiffs do not dispute that, because these claims  
 19 hinge entirely on the allegedly wrongful modification denials and foreclosures of Plaintiffs'  
 20 properties—conduct in which the Holding Company did not participate—these claims cannot  
 21 proceed as a matter of law. *See* Opening Br. at 14. Indeed, Plaintiffs' superficial treatment of these  
 22 claims only confirms that they cannot proceed. Thus, Count VII should be dismissed.

23 **III. CONCLUSION**

24 For the foregoing reasons, Wells Fargo & Company respectfully requests that the Court  
 25 dismiss Plaintiffs' First Amended Complaint in its entirety, with prejudice.

26 Dated: June 4, 2019

WINSTON & STRAWN LLP

27 By: /s/ Amanda L. Groves  
 28 Amanda L. Groves

1 Morgan E. Stewart  
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DEFENDANT WELLS FARGO & COMPANY'S REPLY IN FURTHER SUPPORT OF ITS  
MOTION TO DISMISS FIRST AMENDED COMPLAINT  
3:18-cv-07354-WHA